(30,181)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 317

DOULLUT & WILLIAMS COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] Caption Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA**

No. 17152. In Admiralty

DOULLUT & WILLIAMS COMPANY, INC.,

vs.

UNITED STATES OF AMERICA

LIBEL AND AFFIDAVIT AS TO SERVICE—Filed Dec. 20, 1922

To the Honorable Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana:

The Libel of Doullut & Williams Company, Incorporated, a corporation organized and existing under the laws of the State of Louisiana against the United States Government, owner of the steamship "City of Elwood," in a cause of damage, civil and maritime, alleges as follows:

Article I

That libellant on March 31st, 1921, was and still is the owner and possessor of a certain pile-cluster located in the Mississippi River at a distance of 150 feet from the shore of said River at low water mark. Said piling cluster consists of five wooden piles or timbers, each of approximately 60 feet in length, firmly driven in and attached to the bottom of the River, fastened and held together as a unit having a diameter of not more than four feet, the depth of the water surrounding them being at all times not less than 16 feet, said pile cluster extending perpendicularly of about 25 feet out of the and above the water. Excepting three other similar pile clusters located at a distance of 150 feet from the shore and at a distance of approximately 75 feet from the aforesaid pile cluster and 75 feet apart from each other belonging to libellant, there are no structures nor wharves, nor any extensions of the shore of any kind, in front of, about, opposite, adjacent to or near said pile cluster, said pile cluster being at all times independent of and entirely disconnected from the shore or land or anything on the shore or land by the navigable waters of the Mississippi River and for a distance of approximately 3/4ths of a mile from the western shores of said River, said pile clusters being always and entirely surrounded by the navigable waters of said River.

[fol. 3] That at no time has said pile cluster any connections either actual or anticipated nor has it any connections for any purpose whatever with the shore of said River or with anything on said shores, either of a temporary, prospective or permanent character and either actual or anticipated with any commerce on land or anything connected with land or with the shores of said River.

That libellant had and has authority from the proper Governmental authorities to erect, maintain and use said pile cluster for such marine purposes as said cluster may be adapted, and used; that said pile cluster, at said locality is well known to pilots, navigators and other operators engaged in the navigation of vessel- of various tonnage and draft, and the same is in fact used by them for the purpose of determining depths, distances in and over the navigable waters of the Mississippi River in and about said locality in order to safely and conveniently navigate said vessels, and for all other marine purposes, having no connections either actual or anticipated with any land or with commerce on land.

That at times of the swift current of the Mississippi River and during bad weather said pile cluster is used by vessels to tie up to so as to avoid anchor dragging and likewise to lessen the dangers of collision with other vessels whilst navigating in said River. That river pilots-navigators and other operators of vessels having a draft, whether loaded or unloaded as the case may be, of 16 or more feet use said piling during low river to indicate and aid that it is safe to navigate on the outer or west side of said pile cluster, which outer edge is the main channel of said River. At no time do any vessels use said pile cluster to load or unload cargo or passengers, said pile cluster being incapable of so being used and incapable of being used for any commerce on land and incapable of being used for any purpose except in the operation, maintenance and navigation of vessels in navigable water and in aid of their navigation or in aid of commerce on water, and having no relation or connection with land or land commerce.

[fol. 4] Article II

On March 31, 1921, a very high wind and bad weather was in progress on said day about six o'clock A. M., the steamship City of Elwood, was moving to near said pile-cluster and the master and crew of said Steamship were warned by libellant to keep away and at a safe distance therefrom and further warned that damage and injury to said pile cluster and to said vessel were likely to occur in disregarding said warning. But said warning was disregarded, notwithstanding that had said warning been heeded to, collision with said cluster would have been avoided and the injury and damage to said cluster averted. That said Steamship is of a capacity of about 10,000 tons gross, and that master and crew well knew that said pile-cluster was in water of insufficient depth to allow said Steamship to safely navigate near said pile-cluster and said pile cluster was and is an aid to said steamship to safely navigate the Mississippi River at said locality on the outer edge of said pile-cluster, in that said pile-cluster was in only 16 feet of water and the depth of water was insufficient for the purposes of navigation of said vessel in particular at or near said piling, all of which facts were well known to the Master and crew of said vessel. That said Steamship was blown with great force into and against said pile cluster and as a result of the impact and collision, three of the pilings forming the unit or cluster were broken and damage and injury thereby caused to libellant.

Article III

Carelessness and negligence of the said Steamship, its officers, master and crew are alleged in disregarding said warnings, said officers, master and crew well knowing that it was unsafe to navigate too closely to said pile-cluster and well knowing that said pile-cluster was and is an aid to the safe navigation of said vessel, as hereinbefore alleged and particularly during the high current of the River, high wind and bad weather.

Article IV

That at the time of said collision and accident, the said Steamship was and still is owned and operated by the United States Government, its agents and employees.

Article VI

Libellant avers that by reason of said accident it has been damaged in the full sum of four hundred one and 32/100 ($401.32) dollars, [fol. 5] cost of replacing the three piles broken by the said Steamship City of Elwood, which libellant is entitled to recover from the United States Government.

Article VII

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process of monition may issue to the Marshal of the Eastern District of Louisiana, commanding him to cite and admonish the said Government of the United States of American, through the District Attorney for the Eastern District of Louisiana, to appear and answer all and singular the matters aforesaid and that the Court will pronounce for the damages aforesaid with interest and costs, and will give to the libellant such other and further relief as in law and justice it may be entitled to receive.

(Signed) McCaleb and McCaleb, Proctors for Libellant.

Jurat showing the foregoing was duly sworn to by Paul Doullut omitted in printing.

[fol. 6] [Title omitted]

Before me, the undersigned authority, personally came and appeared Paul Doullut, who, being duly sworn, deposes and says: That he is the Vice-President of Doullut & Williams Company, Incorporated, that the President of said Corporation is now temporarily absent from the United States, that he is authorized to make this affidavit, that in compliance with Section 1251½A of Act of March 9th, 1920, that Doullut & Williams Company, Inc., has served on December 20th, 1922 a copy of its libel on the United States District

Attorney for the Eastern District of Louisiana, and has mailed a copy of said libel by registered mail to the Attorney General of the United States.

(Signed) Paul Doullut.

Sworn to and subscribed before me this 20th day of December, 1922. (Signed) E. Howard McCaleb, Jr., Notary Public. (Seal.)

[fol. 7] UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed February 8th, 1923

To the Honorable Rufus E. Foster, judge of the District Court of the United States for the Eastern District of Louisiana:

The answer of United States of America to the libel and complaint of Doullut & Williams Company, Inc., with respect shows:

I

The allegations of Article 1 of the libel are denied, except in so far as they may be specifically hereinafter admitted.

II

The allegations of Article 2 of the libel are denied.

III

The allegations of Article 3 of the libel are denied.

IV

The allegations of Article 4 of the libel are admitted.

V

The allegations of Article 5 of the libel are denied.

VI

The allegations of Article 6 of the libel are denied.

VII

And, further answering, respondent avers that this Court, sitting as a Court of admiralty, is without jurisdiction ratione materiæ of the subject matter of this suit.

Wherefore respondent prays that the libel be dismissed with costs; and for all general and equitable relief.

(Signed) Terriberry, Rice & Young, Proctors for Respondent. Edouard F. Henriques, Special Assistant to the United States Atty. in Admiralty.

[fol. 8] Jurat showing the foregoing was duly sworn to by Joseph M. Rault omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TESTIMONY—Filed Jan. 12, 1924

Testimony taken in the above entitled and numbered causes on behalf of libelant Before Reginald H. Carter, Esq., commissioner herein, at the office of Messrs. Terriberry, Rice & Young, Whitney Bank building, New Orleans, La., on the 27th of November, 1923.

Appearances: Mr. E. Howard McCaleb, Proctor for Libellant; Messrs. Terriberry, Rice & Young (Mr. Rault), Proctors for Respondent.

Stipulation

It is stipulated and agreed between Counsel that the testimony of the witnesses may be taken down in shorthand and transcribed on the typewriter, signing, sealing, certifying and filing being waived, stenographer's fees to be a taxable disbursement, copy of testimony to be furnished opposing Counsel.

It is further stipulated that this testimony is taken by consent between Counsel for the respective parties to be used in both of the above numbered and entitled cause-.

[fol. 10] By Mr. Rault: The consent given here to the taking of this testimony is not to be construed as an admission of jurisdiction. The Jurisdiction of this Court sitting as a Court on Admiralty is of course denied in both causes.

Admission: It is admitted that the damages to the structures in the case of the S/S. City of Elwood is the sum of $401.32, being the cost of three pilings and the binding of galvanized iron wire alleged by Libelant to have been broken by the S/S. City of Elwood.

Admission: It is admitted that the damages to the structures in the case of the S/S. Galveston is the sum of $519.92, being the cost of Six pilings and the galvanized iron cable alleged by Libelant to have been damaged by the S/S. Galveston.

Admission: It is admitted that the S/S. "City of Elwood" and the S/S. "Galveston" were at the time of filing the Libel and subsequent thereto in a port of the United States and that at the present time at the taking of this testimony said vessels are in a port of the United States, to-wit Norfolk, Va.

Captain CHARLES T. CLASON, being duly sworn and examined on behalf of libelant, testified as follows:

Direct examination.

By Mr. McCaleb:

Q. What is your name?
A. Charles T. Clason.
Q. Do you know the pilings, or cluster of piling, located at the foot of Elizardi Street, or opposite the foot of Elizardi Street in the Mississippi River?
A. Yes sir.
Q. By what name are those cluster of piling know-, to whom do they belong to?
A. Doullut & Williams Landing.
Q. Captain what is your occupation or profession?
A. I am now Marine Superintendent of W. G. Coyle & Company, Incorporated.
Q. Have you been engaged in navigating vessels as Pilot or Captain.
[fol. 11] A. Yes Sir.
Q. For how long?
A. Thirty years.
Q. Have you been so engaged in the Port of New Orleans?
A. Yes sir.
Q. On the Mississippi River?
A. Yes sir.
Q. You consider yourself qualified by reason of your experience to testify as to the adaptability and the purpose of the piling known as the Doullut & Williams Landing piling?
A. I do.
Q. As a Pilot what *what* assistance, if any, do these pilings give you in navigating vessels? Do you consider that these pilings are an aid to navigation?

Objection.—Mr. Rault: I object to the second part of that question on the ground that it involves a conclusion of law.

A. It assists in navigating your vessel in foggy weather to the extent that if you get in close enough to recognize those pilings why you know where they are at. Also on a dark night if there happens to be no lights on vessels that are moored to the pilings or on the pilings themselves, it is an assistance in helping you navigate up the river.

Q. How far apart are these pilings located from the shore of the Mississippi River?

A. I judge about, from the edge of the bank in low river, fifty or seventy five feet and in high river to the levee I would say about 125 or 150 feet.

Q. Are these piling connected in any way with the land?

A. None whatever, they are standing to themselves.

Q. Do you know approximately the depth of the water where these pilings are located?

A. About how much water there is?

Q. Yes, how deep the water is?

A. I have been in alongside of them in low river with the Sipsy and if I remember right I have not touched with the tug. Now the Sipsy is drawing about 15 feet of water.

Q. So it must be over fifteen feet?

A. I will say about fifteen feet because I remember in low river I hit the rocks on the mats that were sunk around there.

[fol. 12] Q. When you speak of the Sipsy you mean the tug boat belonging to W. G. Coyle & Company.

A. Yes sir, of which I was Master at the time.

Cross-examination.

By Mr. Rault:

Q. How many piling are there to a cluster?

A. Well now the clusters that were knocked down, I don't know how many piling but I am speaking when I was Master of the tug in times that I have been alongside at the Doullut & Williams piling I think in some of the clusters there were some three and four piling. Then they had single piling driven along there.

Q. In a cluster that contains three to four to five piling we will say please describe how these piling were bound together?

A. They were driven close together and bolted or sometimes wrapped with wire around the top.

Q. Do you know how long these piling are?

A. No sir, I do not.

Q. You said they were from fifty to seventy five feet from the shore in low water and from 125 to 150 feet in high water?

A. About that.

Q. From what point did you begin your measurement, from the crown of the levee or the slope of the levee where it touches the river?

A. In high river.

Q. In either case, take the low first?

A. I just don't get you on that.

Q. What I mean is this——

A. You see the water in high river comes up to about the center of that levee, there is a little spread there.

Q. I think you misunderstood my question. You said seventy five feet from the piling to the shore?

A. In low river, yes about seventy five feet, that is to where the water strikes the batture.

Q. And in high water it is from 125 feet to 150 feet?

A. Where it strikes the levee.

Q. Where it strikes the levee again?

A. Yes sir.

[fol. 13] Q. In other words you don't use the crown of the levee as your measurement?

A. No sir.

Q. You have stated in answer to Mr. McCaleb's question that these piling are helpful in navigation in foggy weather or on dark nights if you get close to them so you can see them?

A. That is it.

Q. If you got close enough to a wharf so you could see the wharf that would be helpful in the same way would it not?

A. Yes sir.

Q. Or if you got close enough to shore so you could see a building on the shore that would be helpful in the same way?

A. Same thing.

Q. These piling are not lighted at night time are they?

A. I have seen barges and drivers moored to these piling with lights on the barges or drivers.

Q. The Port rules governing navigation providing for the mooring of barges along the fairway are that they should have lights on them?

A. Yes sir.

Q. That is in accordance with Pilot Rules. But I mean on the piling themselves when no barges are moored to them, do they normally have lights?

A. I never saw any.

Q. So you cannot see the piling unless you got right on top of it or unless there was a bright moonlight night?

A. That is it.

Q. Are these piling marked on the Governmental charts governing the navigation of the Mississippi River?

A. That, I cannot answer.

Q. I hand you a Mississippi River Government chart from Grand Prairie to New Orleans, you have seen that chart before? (Counsel hands chart in question to witness. Witness examines same.)

A. Yes sir and I never saw any landings marked off on that chart.

Q. No pilings either?

A. No sir.

Q. They have buoys marked on the chart have they not?

A. Yes sir.

Q. They have light houses marked on the chart?

A. Yes sir.

Q. They have beacons marked on the chart?

A. Yes sir.

[fol. 14] Q. All those Governmental aids to navigation are marked on these charts?

A. Yes, sir.

Q. But not piling?
A. No sir.

Redirect examination.

By Mr. McCaleb:

Q. You said just now that even structures on shore would assist you in foggy weather and dark nights in the navigation of your vessel. Do they render the same assistance in navigation as these pilings would?

A. Well say for instance I was coming along down to the American Sugar Refinery and I saw the Refinery or the wharf I would know that I was in front of the American Sugar Refinery or if it loomed up ahead of me I would know that the wharf was there and would keep away from it to keep from hitting it. I would keep out until I lost sight of the Refinery or the wharf.

Q. In respect to navigation is there really any difference between these piling and a buoy or a Government piling, is there any difference in so far as assisting you in navigation?

Objection.—Mr. Rault: Objected to on the ground that the question involves a question of law.

Q. In other words if the Government had put piling there which as you have testified would assist you in navigating your vessel, would there by any difference any practical difference, between the Government piling and the Doullut & Williams piling to assist you in navigating the vessel?

Objection—Mr. Rault: I object to the assumption.

A. No I cannot see that there would.

Q. A light house as you have testified, a light house on land assists you in navigating a vessel does it not?

A. There is no question about that, no sir.

Q. And these pilings on water also assist you in navigating a vessel?

A. Yes sir.

Q. And pilings with a light on it, like a bug light house, also assist you in navigating a vessel?

A. Yes sir.

Q. As I understood your testimony you do regard this piling, these clusters as an aid to navigation?

Objection—Mr. Rault: I object to the question as leading in involving the same conclusion of law.

[fol. 15] A. In a fog or dark nights.

Recross-examination.

By Mr. Rault:

Q. In the same way that the American Sugar Refinery on shore lighted up is an aid to navigation?

A. Yes, sir.

By Mr. McCaleb:

Q. And in the same way as a bug light house or buoy entirely surrounded by navigable water?
A. Yes, sir.

Captain HARRY HALL, sworn and examined on behalf of libelant, testified as follows:

Direct examination.

By Mr. McCaleb:

Q. What is your name?
A. Harry Hall.
Q. What is your occupation or profession?
A. Master of the tug Debardeleben.
Q. How long have you been engaged in navigation?
A. About twenty years.
Q. You have been engaged in navigation on the Mississippi River during that time?
A. No, since 1906.
Q. Do you consider yourself, by reason of your experience as a navigator, qualified to give testimony as to whether or not structures in navigable water assists you in navigating a vessel?
A. Yes, sir, I do.
Q. Do you know the piling or clusters, in front of the foot of Elizardi Street in this city, known as Doullut & Williams piling?
A. Yes, sir.
Q. What assistance or aid, if any, do those pilings give you in navigating a vessel of any kind? Do they assist you, do they aid you in navigating a vessel, do they aid you in any way?
A. Yes, sir, to some extent in fog or on dark nights.
Q. Do you know about how far these piling are from shore in high or low water?
[fol. 16] A. Approximately about seventy or eighty feet in low water, probably from 100 to 150 feet in high water.
Q. Are they in any way connected with the shore or land?
A. No sir.
Q. Could they be of any assistance in loading or unloading vessels with passengers or freight, loading freight or unloading freight or passengers?
A. No sir.
Q. Are they not often used for vessels to tie up to?
A. Yes, I have tied up to them myself on several occasions.

Cross-examination.

By Mr. Rault:

Q. These piling that were destroyed or damaged, do you recall them?
A. Those piling that were destroyed I cannot say about but I remember those cluster in front of that landing.

Q. Are these clusters in front of the Doullut & Williams landing or are they an extension of the landing running out?

A. They are in front of the landing.

Q. The landing, as I understand, is L shaped. In other words it is a sort of a rant coming out from the shore and then there is a landing that is parallel with the river. Is that correct?

A. Yes sir.

Q. Are the piling in front of the part of the wharf that is parallel with the river or do they constitute an extension to the wharf that is parallel with the river?

A. They are in front of the wharf but not connected with it.

Q. You said that these pilings helped you on a dark night or in a fog. Just explain that?

A. They will help you coming up the river, coming anywhere close. As a rule all boats come up that side of the river and of course if they see those piling it prevents from getting too close in.

Q. If you see the wharf that prevents you from getting too close in too, does it not?

A. Yes, sir.

[fol. 17] Q. If you see any structures on shore that prevents you from getting too close in too, does it not?

A. Exactly.

Q. Are these pilings marked on any Government chart?

A. No, sir.

Q. Have you ever seen them marked on any chart issued from any source?

A. Not to my recollection.

Q. I have here a Governmental chart covering the Mississippi River from Grand Prairie to New Orleans. You have seen that chart?

A. Yes, sir.

Q. You know they are not on that chart?

A. Yes, sir.

Q. I have other charts here issued by the Board of Commissioners for the Port of New Orleans, the Dock Board, they are not on that chart are they?

A. I don't know, I have never seen those charts.

Q. I show you a very large chart of the harbor of New Orleans, issued by the Board of Commissioners for the Port of New Orleans and I point out to you Elizardi Street and Andry Street and Egamia Street. I also show you a landing there indicated on that chart, a wharf. Is that the Doullut & Williams wharf? (Counsel exhibits chart to witness and witness examines same.)

A. I cannot say. Is not Doullut & Williams landing right in front there? Is this supposed to be the landing? (Witness indicating on the chart.)

Q. Is that the location of the wharf at Egania Street or Andry Street or Elizardi Street?

A. I don't think so.

Q. You don't recognize it?

A. No, sir.

Q. You see the three streets there, Egania, Andry and Elizardi Streets?

A. Yes sir.

Q. And you have stated that these pilings are at or about Elizardi Street?

A. Yes sir.

Q. Are there any piling marked on that chart?

A. None whatever.

Q. I will ask you this; are not all Governmental aids to navigation marked on the charts?

A. Yes sir.

Q. So then these pilings are not Governmental aids to navigation. Is that correct?

[fol. 18] A. Yes, sir.

Q. That is correct?

A. That is correct.

Redirect examination.

By Mr. McCaleb:

Q. They are not Governmental aids to navigation but they are private aids to navigation, are they not? They nevertheless are aids to navigation though not Governmental aids to navigation?

A. They are aids to us Mariners as I said before.

Q. You spoke about a landing there, will you kindly describe the landing? When was that landing put there, do you know?

A. I don't remember but they used to have a little small wharf coming out of there.

Q. A little small wharf?

A. Yes sir.

Q. How far are these pilings from that small wharf?

A. They are probably from 90 to 100 feet.

Q. Is it possible to carry any freight or passengers from that piling to that landing without using a boat?

A. No sir.

Q. About how deep is the water there around those pilings?

A. It must be fully fifteen feet because I have been there drawing fifteen feet lying alon-side of them many times.

Q. Could a boat navigate between the pilings, depending on the size of the boat, between the pilings and the shore?

A. Yes sir, I have seen boats tied inside of those pilings.

Q. Could they navigate in between?

A. Yes they could pass right around.

Q. It is not a fact that there are other structures in the Mississippi River or places in the Mississippi River which are known to river men that have not been put there by the government that are aids to navigation.

A. Yes sir, they are used as a help and aid.

[fol. 19] Recross-examination.

By Mr. Rault:

Q. Is it, or is it not, your idea that these pilings were put down by Doullut & Williams for the purpose of helping the tug boat people find their way around the river?
A. No sir; that is not my idea.

Objection.—Mr. McCaleb: I object to the question as calling for an opinion not within the purview of the witness.

Q. They were put down for other purposes and are used for other purposes primarily?
A. Yes sir.
Q. That is for tying tug boats up and so forth?
A. And mostly for their own use.
Q. For example please?
A. Mostly Doullut & Williams tie up their plant there, which is mostly, seafaring, pile drivers, barges, etc.,

By Mr. McCaleb:

Q. This tying up, is in other words, mooring?
A. Yes sir.
Q. These piling- act as a sort of anchor?
A. Yes sir.
Q. Instead of having an anchor they just tie up to the piling?
A. Yes sir.
Q. And for mooring barges they are just as good as an anchor, they are even better than an anchor?
A. They are practically as good.

By Mr. Rault:

Q. For mooring barges they are just as good as a wharf are they not?
A. Yes sir.

By Mr. McCaleb:

Q. They are not a wharf though are they?
A. No sir.

By Mr. Rault:

Q. They are not an anchor are they?
A. No sir.

By Mr. McCaleb.

Q. Nor are they a wharf because they are not connected with the wharf?
A. Well that is your opinion.

[fol. 20] [Title omitted]

[fol. 21] STIPULATION RE TESTIMONY—Filed Jan. 12, 1924

Stipulation.—Signing, sealing, certification and filing are hereby waived, and it is agreed by and between counsel for the respective parties that the testimony herein may be taken down by a stenographer, and transcribed on the typewriter, stenographer's fees to be a taxable disbursement, and copy of this testimony to be furnished opposing counsel.

It is further stipulated that this testimony is taken for and may be used in both of the above suits.

LESTER C. SMITH, sworn and examined as a witness in the above suits on behalf of the libelant, testified as follows:

Direct examination.

By Mr. McCaleb:

Q. What is your name?

A. Lester C. Smith.

Q. Mr. Smith, you are connected with Doullut & Williams Company, Inc., are you not?

A. I am.

Q. Do you know the locality fronting the river on Elizardi, Egania and Andre Streets?

A. I am familiar with that location, yes.

Q. Will you kindly look at the photographs which I show you, marked "D & W-1", "D & W-2", "D & W-3", "D & W-4" "D & [fol. 22] W-5" and "D & W-6", and ask you, does that—those pictures—represent the part in front of any one of those streets, and what street, in that locality?

(Documents in question handed to witness. Witness examines same.)

A. Well, it appears to me to be in front of Elizardi Street, close to it.

Q. At the time of the accident by the City of Elwood to these pilings, in March 1921, were there more than one piling in front, more than one cluster?

A. There were several clusters of piling, most of which were five-pile clusters. This line of piling stretched from approximately the Elizardi Street wharf down stream, for two or three hundred feet.

Q. How far apart were these pilings from each other on the river?

A. The clusters were spaced fifty to seventy-five feet apart, I should say.

Q. When you speak of the wharf at Elizardi Street, is that a wharf or an approach?

A. That is the wreck of an old wharf, part of which had been demolished, and which is no longer used for anything.

Q. How far is this piling, approximately, from that approach or wharf in the picture?

[fol. 23] A. I should say, about 150 feet.

Q. This picture appears to have been taken recently; would you say whether the river was high or low then?

A. The river was low in stage at the time this picture was taken.

Q. Does that picture show the high water mark of the river; I show you a line on the picture indicating high water mark; does that show the high water mark?

A. That shows one high water mark. There are two lines on the picture. There is another close to the top of this revetment, which apparently shows a still higher water mark.

Q. How far from the levee high water mark would that cluster be approximately?

A. I should say about a hundred feet.

Q. From the levee to the cluster?

A. From the foot of the levee it would be a hundred feet probably, 125 feet from the top of the levee.

Q. I am speaking of the top of the levee?

A. I should say about 125 feet.

Q. Are these clusters in any way connected with any structure on the shore or on the shore itself?

A. These clusters are at all times out in the water; in order to reach those clusters, it would be necessary to get to them in a boat.

Q. Who is the owner of these clusters or pilings?

A. Doullut & Williams Co., Inc.

[fol. 24] Q. Now what are they used for?

A. These pilings have been used chiefly to tie up the barges and some of the pile drivers of the Doullut & Williams Company, Incorporated.

Cross-examination.

By Mr. Rault:

Q. When you say the pilings were 150 feet from your wharf, do you mean upstream or downstream?

A. Downstream from the Elizardi wharf, which is not our wharf. It was an old Dock Board wharf—at least I think it belonged to the Dock Board—but it is really no longer a wharf; it has no connection with the shore; it is just a few old pilings which were left standing in the water, with no floor on it.

Offer.—McCaleb: I offer in evidence the photographs D & W-1 to D & W-6 inclusive.

Q. Do — know when those pictures were taken?

A. About two weeks ago.

Q. Were they taken at high water or at low water?

A. At low water.

[fol. 25] S. B. GEORGE, sworn and examined as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. McCaleb:

Q. What is your name?
A. S. B. George.
Q. Mr. George, were you in the employ of Doullut & Williams Incorporated in March, 1921 and April, 1921?
A. Yes sir.
Q. What were your duties, in what capacity were you employed?
A. Master of the tug boat W. H. Williams.
Q. Were you captain of the tug Polo at any one of that time?
A. Yes; they owned two boats, the W. H. Williams and the Polo. I was master of whichever boat was in commission.
Q. Did you see the Galveston strike any of the clusters belonging to Doullut & Williams located in the neighborhood of Elizardi Street or Andre Street?
A. Yes sir; they broke one five-pile cluster out. This was about April 13, 1921, if I recollect correctly.
Q. Did the Galveston collide with the cluster?
A. Yes sir; with the cluster.
Q. And destroyed the cluster?
A. Yes sir.
Q. Then, as to the City of Elwood; did you see that?
A. Yes sir.
[fol. 26] Q. How many clusters did it break?
A. It broke one pile out of one cluster, and two out of the second cluster.
Q. Did it collide with the cluster?
A. It collided with and set a strain on the cable at the same time.
Q. That was in March 31st, 1921?
A. Round about that date.
Q. Where were you at the time?
A. I was on board of the tug.
Q. Captain, how long have you been a river man?
A. Thirty years.
Q. In what capacity?
A. Master and pilot. I have been master of the W. H. Williams and Polo for twenty-five years, working for those people, Doullut & Williams.
Q. I show you these photographs, marked D & W-1 to D & W-6 inclusive, and ask you if those photographs represent the location of any of the clusters to which you have testified?

(Documents in question handed to witness. Witness examines same.)

A. They represent the clusters, yes.
Q. Represent what clusters; I mean to say, do they represent the cluster that was left, the cluster, any cluster that was struck——

[fol. 27] A. Well, it might represent the cluster that was struck, or even one of the clusters that was left; the clusters all look alike.

Q. Are all the clusters that had been destroyed, have they been replaced, do you know?

A. Since that they have, some of them have been replaced.

Q. That locality shown in the photograph there, does that show the clusters that were struck by the City of Elwood, or the City of Galveston, on that photograph—take any one of the photographs?

A. (Witness referring to photographs.) This one would seem to show one of the clusters the City of Elwood broke.

Q. Now, Captain, you say you have been a river man for about thirty years?

A. Yes sir.

Q. What are those clusters used for?

A. They were used for tieing up the barges and the drivers to.

Q. Are they used by river men for any other purpose?

A. Well, they would come in very handy for an aid to navigation on dark nights and foggy weather, as such marks lie all the time along the river, along the sides, so it would be a great advantage to river men.

[fol. 28] Q. Do river men, or do you, use those clusters and other similar structures in the river to aid you in navigating your vessels on dark nights and foggy weather?

A. Well, several years ago, there were spar buoys, there were three spar buoys between New Orleans and the head of the Pass, which is nothing more than a pile about fifty feet long, fastened with a chain at one end to an anchor, marking three wrecks that were in this river, and this spar buoy would stand up in the river the same as a pile; one marked the Wireless Flat, just opposite the Old Jump, and another one marked the wreck at Magnolia Plantation, and the third marked the wreck at Monroe Flat.

Q. And among the purposes of those spar buoys—were they—was the purpose of those spar buoys to indicate to river men that they were to keep their vessels away from that spot?

A. That was one of the purposes, yes sir.

Objection.—Mr. Rault: Question objected to on the ground that spar buoys are not concerned in this case, and have absolutely no connection with it.

Q. Now, in so far as being an aid to navigation, is there any difference between those spar buoys and the Clusters of piling situated [fol. 29] in this part of the Mississippi River?

Objection.—Mr. Rault: Objection to as calling for a conclusion of law.

Q. In other words, do they answer the same purpose, to aid you in navigation, as a spar buoy?

A. The very same.

Q. Is it possible to load or unload cargo, or load or unload passengers or anything, from a ship on to these piling clusters?

A. No sir, impossible, without the aid of a barge or lighter; passengers would have to use a small boat or other convenience to get to the shore.

Cross-examination.

By Mr. Rault:

Q. Captain, you have testified that you saw the City of Elwood and the Galveston in March and April 1921?

A. About those dates.

Q. Swing against some piling?

A. Yes sir.

Q. Were you present actually on those occasions?

A. Yes sir.

Q. Now, let's take the Elwood: about what time of the day did that happen?

A. Well, this was more than two years ago; it would be almost [fol. 30] impossible to give you the exact hour.

Q. Was it daylight or dark?

A. It was daylight, because I used to leave the landing at 5.00 o'clock, and it was long before 5.00 o'clock, in fact I rang up the office as soon as it was done, and the office is closed at 5.00 o'clock.

Q. Where were you standing when you witnessed this accident?

A. You mean with the City of Elwood?

Q. Yes.

A. I suppose about 75 feet from her.

Q. On what?

A. On the tug boat Polo.

Q. And what happened?

A. Well, she came against these clusters with the force of the wind—it was rather bad weather and it forced them in—and she had a cable, and the cable was tied like this (witness indicating), there was two clusters standing up like this (witness indicating) and she had a cable tied to this one (witness indicating) and a round turn taken around a third one, and as the wind changed, she swung back on the cable and the anchor didn't do any good at all—she had an anchor out too, but the chain was rather slack—and the one the cable was tied to—there was two clusters of piling like this, standing up (witness indicating), and they put a round turn around the downstream cluster and made it fast——

[fol. 31] Q. The upstream cluster, isn't it?

A. The upstream cluster, and when the wind changed, she went back away from the cluster and she set tight on the cable, and this put a strain on the cable and broke off one piling on the middle cluster and two on the downstream cluster—I mean by that the lowest cluster down.

Q. Do I understand from that that she pulled the clusters out?

A. Pulled them out.

Q. By her own cable?

A. She first shoved them in, and then the wind shifted; the squall first came from the southward—about southeast—and shoved the ship in, and then suddenly it changed to the northeast.

Q. Now then, the ship went in; did she hit the cluster?

A. Yes sir; shoved them right in.

Q. And then pulled them out?

A. Pulled them out again.

Q. Now the Galveston: Was that day light?

A. That was day light also.

Q. Where were you standing when you saw that collision?

A. I was standing then, I guess, about 150 feet from the Galveston.

Q. On what?

[fol. 32] A. On the tug.

Q. And what happened on that occasion?

A. On that occasion; There was a heavy squall, and the Galveston was lying at anchor, with a head line out ashore to this old wharf—I will show it to you in a minute—and as the heavy squall came up from the southeast, it swung the ship in, swung her in shore and broke off this cluster, and held the ship there for several hours—I remembered that very clearly—she lay there till some time the next day.

Q. You are positive she knocked over a cluster?

A. Yes sir.

Q. You saw it yourself?

A. Yes, sir; saw it very plain.

Q. Now I show you a picture, a panorama picture, showing the steamer Oskaloose lying parallel with clusters—that is, five clusters—of piling. That picture is taken in the vicinity of where this alleged damage occurred?

(Document in question handed to witness. Witness examines same.)

Q. Now I understand that some of these pilings are the ones that are claimed to have been destroyed by the Galveston or the Elwood?

A. Those are the ones, yes sir.

[fol. 33] Offer.—Mr. Rault: I offer this picture in evidence marked "U. S. Exhibit-1."

Q. Are there any lights on these pilings?

A. No sir; not when the pilings are empty—I mean when there is nothing tied to them.

Q. In other words, when there are lights on the boats tied up to the piling, the piling can be seen?

A. Yes sir.

Q. But if there are no boats, there are no lights?

A. No sir.

Q. Then how can you see those piles at night time?

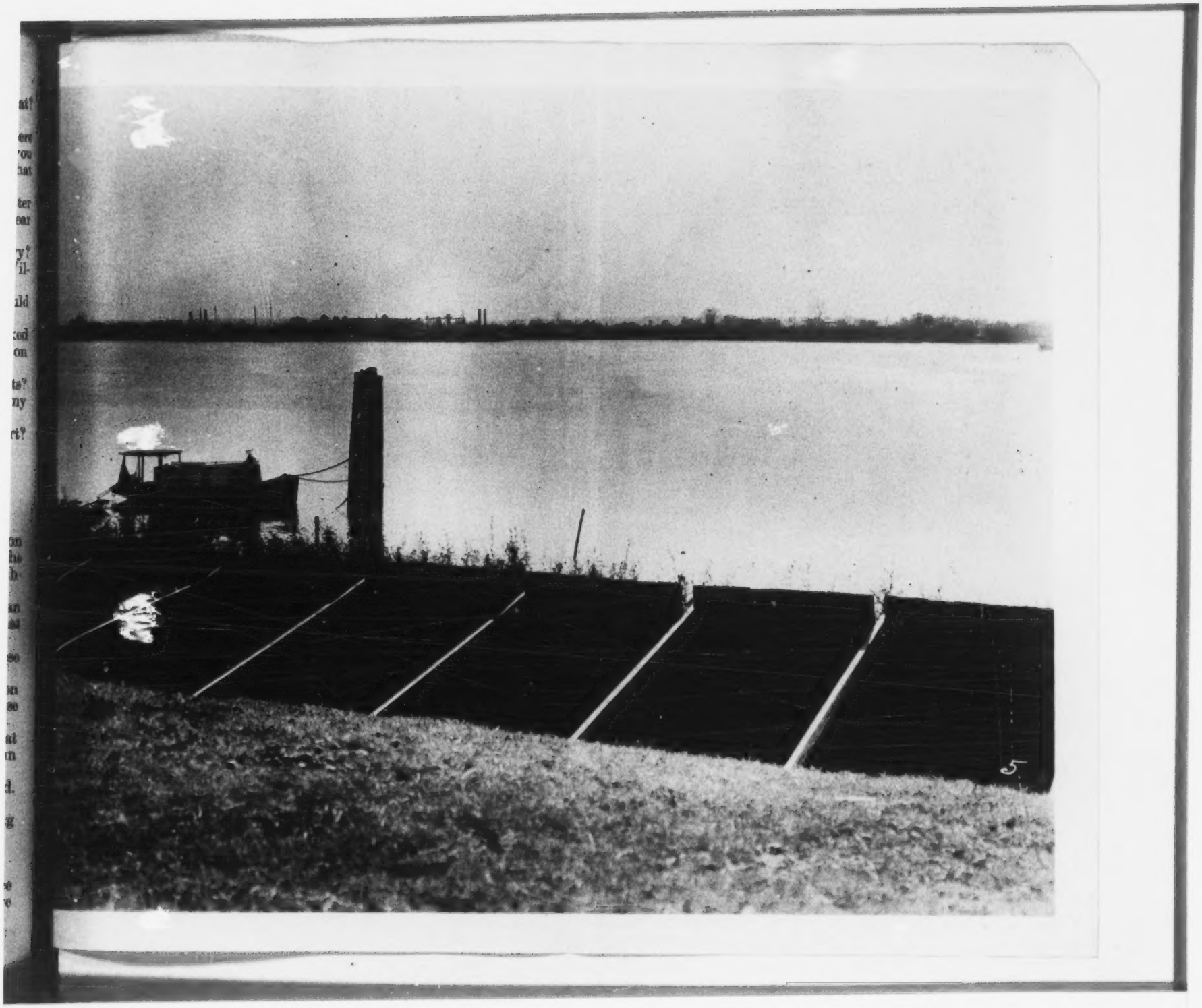
A. We can see these pilings much better than we can see the low banks; anything that stands up high over the water, we can detect that very much quicker than we can a low lying bank.

Q. How about the American Sugar Refinery; you could see that?
A. Yes sir.
Q. So, if you saw the American Sugar Refinery, when you were in the neighborhood of the American Sugar Refinery, and if you saw this building, you would know you were in the river at that point?
A. Yes sir; and every pilot knows pretty near where every cluster of piling is, and if he saw those pilings he would know he was near Doullut & Williams Landing.
[fol. 34] Q. And if he picked up the American Sugar Refinery?
A. He would know he was only five miles below Doullut & Williams landing.
Q. In other words, a piling acts like any building on shore would act, to designate where you are in river.
A. The very same, yes; in our line of business, we often marked trees, we have trees along the river bank that we use to help us on dark nights.
Q. Of course these pilings are not marked on navigation charts?
A. No; they are not marked on navigation charts, not to my knowledge.
Q. You have never seen them marked on any navigation chart?
A. Never have, no sir.

Redirect examination.

By Mr. McCaleb:

Q. Captain, wouldn't these buildings have another object on dark nights and foggy weather to indicate to the navigator the depth of the water and to keep him from going on shore or beaching his vessel?
A. Well, yes, they would act the same as a wharf would, an object like that would answer the same purpose as any mark that would indicate where to keep off of the bank.
[fol. 35] Q. Well, wouldn't you know the depth of water at these pilings, wouldn't any river man know the depths of the water?
A. Well, I don't know that every man would know, but then they were so near the bank, no man would run exactly where these pilings were, he would always keep on the river side of them.
Q. Now, if the piling wasn't there, wouldn't it be possible that the navigator, the captain or pilot of a vessel, might perchance run on the batture?
A. Yes sir; if he couldn't pick out any mark, he certainly would.
Q. And these pilings are the marks that he picks out?
A. If he picked up these pilings, he would know he was getting near the bank.
Q. So he keeps away from the bank by seeing these pilings?
A. Yes sir.
Q. Referring to this panoramic map, U. S. Exhibit 1, I notice that there is, on the right hand side of the picture, a sort of structure or wharf (counsel exhibiting document to witness)?
A. Yes sir.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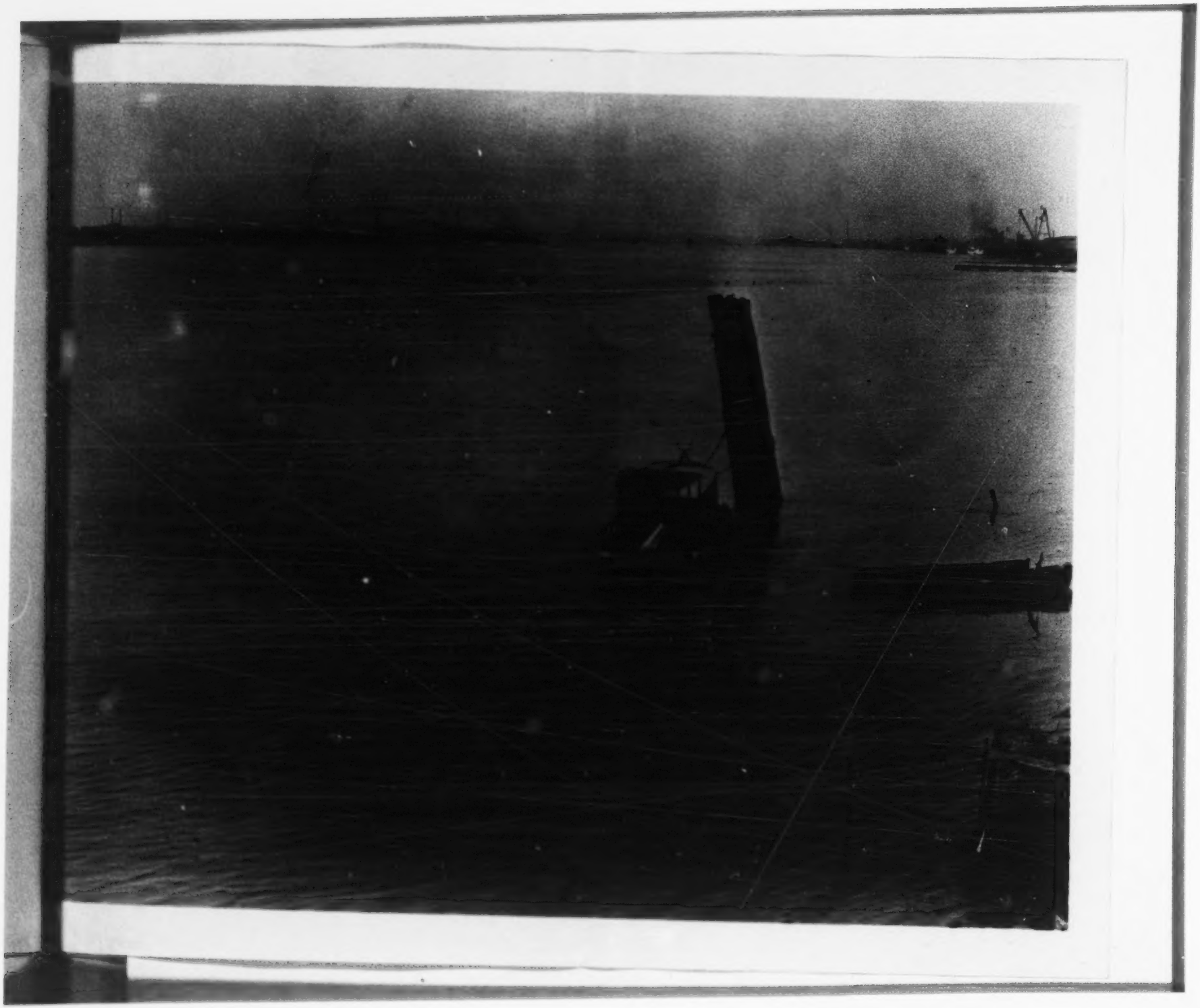

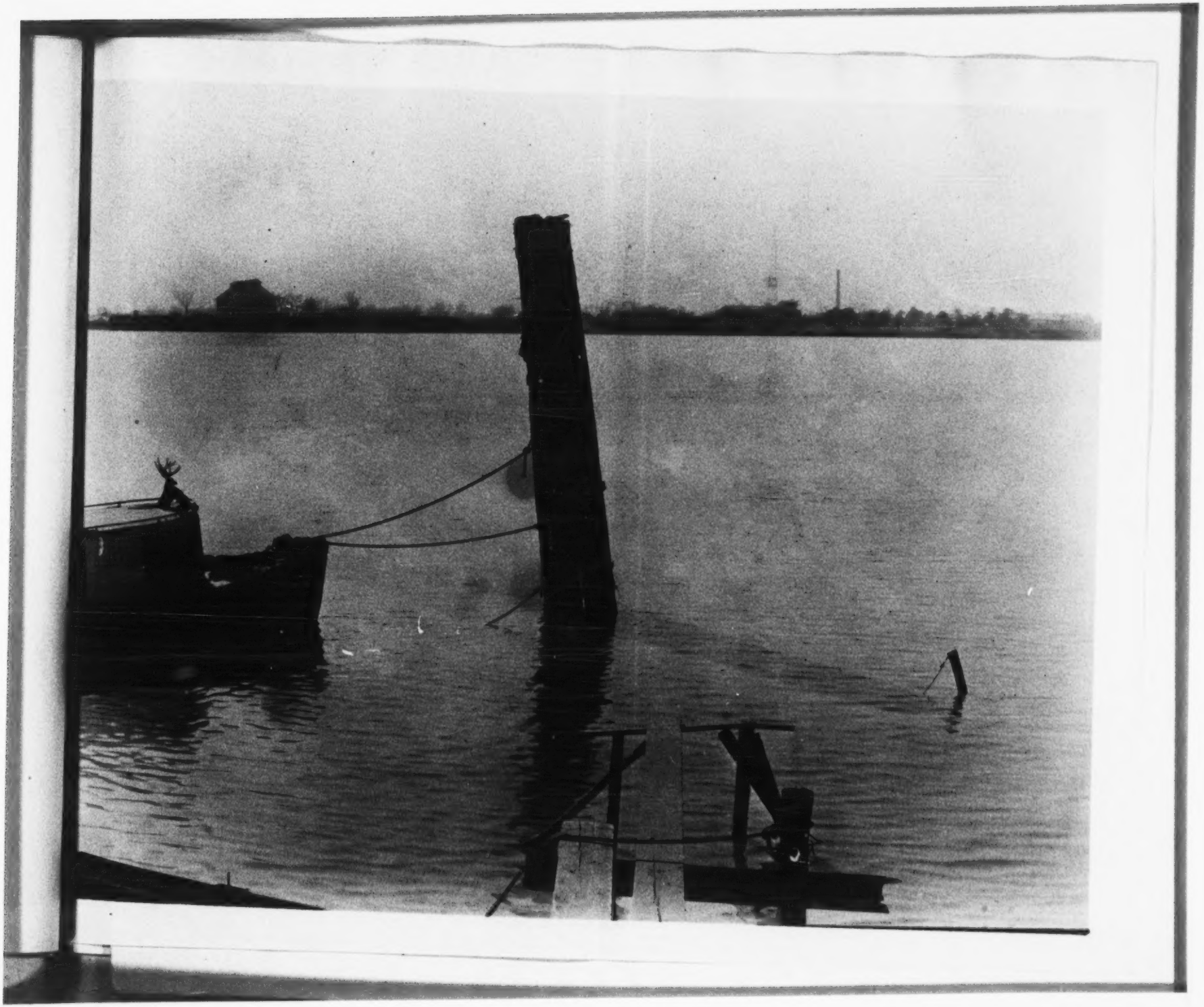

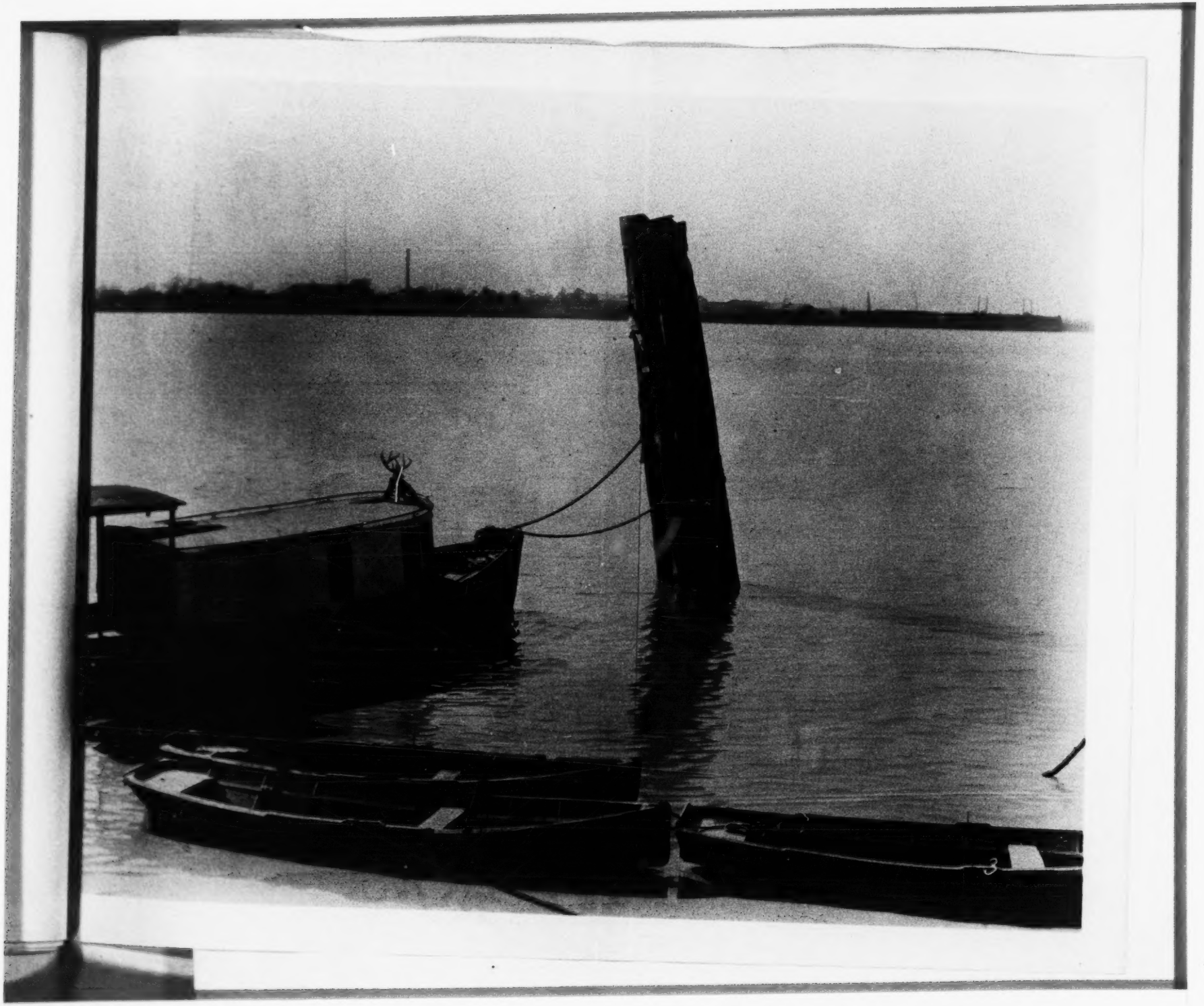

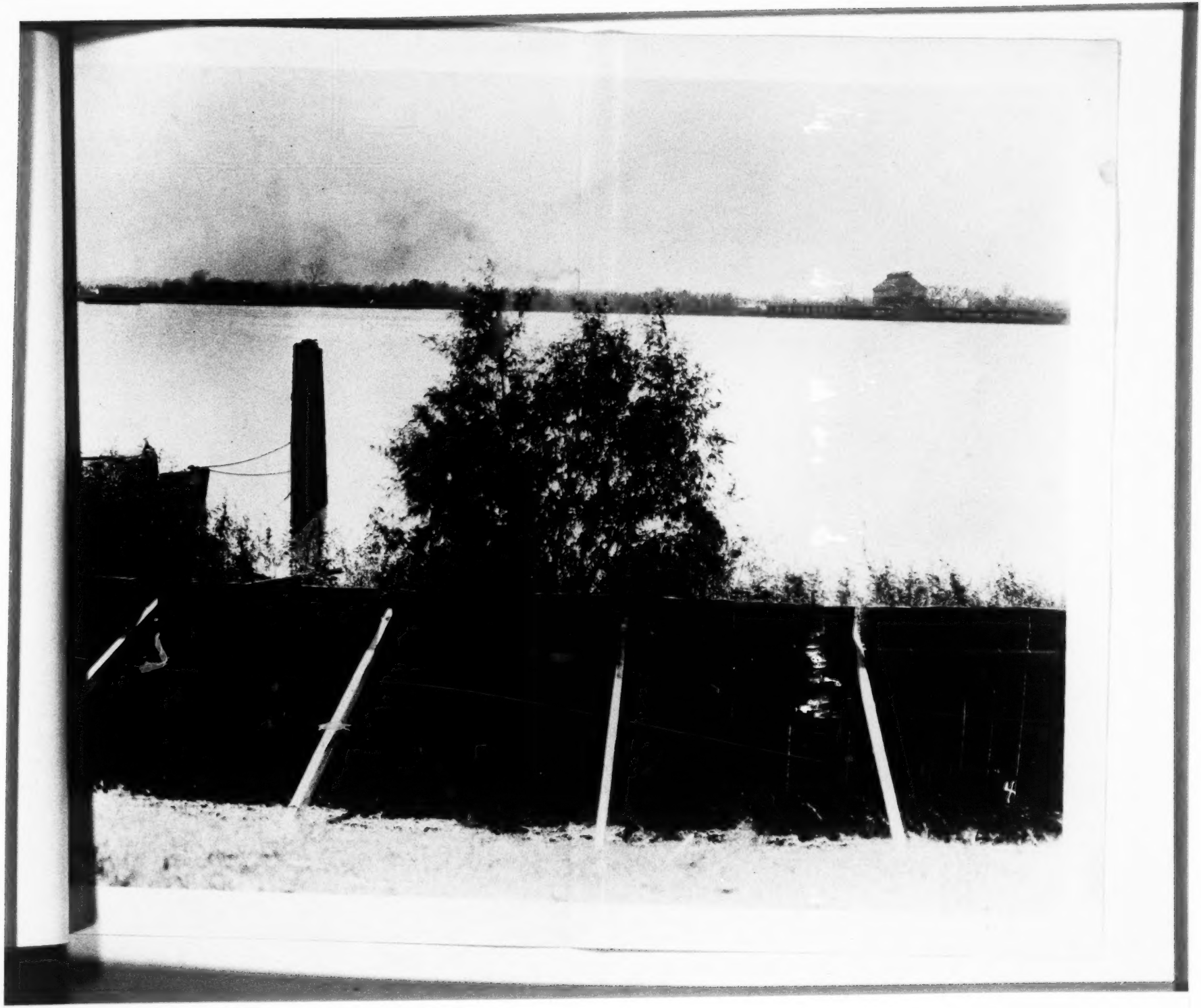
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Q. Was that wharf there, or that structure there, *there* at the time that the Galveston——

A. That structure was there at the time of the Galveston and she also knocked the barge from under this structure, out with the [fol. 36] wind.

Q. That structure isn't there to-day, though, it is?

A. Very little of it; it is an old wreck today.

Q. Is that structure in any way connected with this piling?

A. No sir; no way at all.

Q. Now does this picture here—I am showing you the picture marked "U. S. Exhibit 1"—does this picture show the piling that was struck by the Galveston?

A. Yes sir.

Q. When I said "piling" I meant "Cluster."

A. I know; cluster.

Q. The piling struck by the City of Elwood is further downstream?

A. Further down this way, yes.

Q. About how far from this set of clusters, on this picture is the piling on which the City of Elwood struck?

A. About 225 feet; in that neighborhood.

Recross-examination.

By Mr. Rault:

Q. There are no scales of any kin*g* on these pilings to show the depth of the water?

A. No sir.

Q. You say that the piling would keep a man from running ashore, if he saw it?

A. If he saw it, yes sir.

[fol. 37] Q. If a man saw a run way or wharf, would that keep him from running on shore?

A. It would be an aid for him to keep off.

(Here follow D. & W. Exhibits Nos. 1, 2, 3, 4, 5, and 6, marked side folio pages 38, 39, 40, 41, 42 and 43.)

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT RE U. S. EXHIBIT No. 1—Filed Jan. 12, 1924

Respondent offers, produces and files in evidence the following:

U. S. Exhibit 1, a photograph offered in evidence at the taking of the testimony of S. B. George, witness on behalf of libelant.

(Signed) Terriberry, Rice & Young, Proctors for Respondent.

New Orelans, January 12, 1924.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed Feb. 1, 1924

This cause having been heard upon the pleadings and proof and after argument of counsel and on due consideration thereof:

It is ordered, adjudged and decreed by the Court that the above numbered and entitled suit be and the same is hereby dismissed for want of admiralty jurisdiction over the subject matter of the cause.

Decree rendered February 1st, 1924.

Decree signed February 7th, 1924.

(Signed) Rufus E. Foster, Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 14, 1924

To the Honorable Rufus E. Foster, judge of the United States District Court for the Eastern District of Louisiana:

Now comes Doullut & Williams Company, Inc., libellant, by M'Caleb & M'Caleb, its proctors and feeling itself aggrieved by the final decree of this Court entered on the 7th day of February, 1924, dismissing this cause for want of jurisdiction of the Court as a Federal Court, hereby prays that an appeal may be allowed to it from the said decree to the Supreme Court of the United States and in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause, and that the amount of security may be fixed by the order allowing this appeal; and petitioner further prays that this appeal may be allowed returnable according to law, and that a transcript of the record proceedings and papers duly authenticated be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of Errors herewith filed by petitioner, may be reviewed and if error be found corrected according to the laws and customs of the United States.

(Signed) M'Caleb & M'Caleb, Proctors for Petitioner, Libellant.

Order

Assignment of errors having been duly presented with the foregoing petitioner, it is ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby

allowed as prayed, and that bond of appeal is hereby fixed at the sum of $100.00.

February 14th, 1924.

(Signed) Rufus E. Foster, Judge.

February 14th, 1924.

Notice of Appeal received, citation and service of citation waived. (Sgd.) Edouard F. Henriques, Spc. Asst. in Admiralty to U. S. District Attorney. Terribery, Rice & Young, Proctors for Respondent.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 14, 1924

The Doullut & Williams Company, Inc., libellant and appellant, in the above entitled cause, in connection with its petition for appeal herein presented and filed therewith, this assignment of errors as to which matters and things it says that in the record, decrees and proceedings herein there is manifest error, and that the District Court of the United States, for the Eastern District of Louisiana, erred in this, to-wit:

1. In dismissing this cause for want of jurisdiction over the subject matter.

2. In holding that the United States District Court for the Eastern District of Louisiana has no jurisdiction as a Federal Court, over the subject matter of the cause, and in dismissing this suit for want of jurisdiction in the Court as a Federal Court.

Wherefore the said libellant and appellant prays the Honorable Court to examine and correct the errors assigned and for the reversal of the judgment and decree of the United States District Court for the Eastern District of Louisiana to the end that the jurisdiction of the United States District Court for the Eastern District of Louisiana be maintained and that the Supreme Court of the United States be directed to enter a decree maintaining the jurisdiction of the United States District Court, for the Eastern District of Louisiana as a Federal Court. And for all general relief.

(Sgd.) McCaleb and McCaleb, Proctors for Libellant and Appellant.

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF DISTRICT JUDGE CERTIFYING THE QUESTION OF JURISDICTION—Filed Feb. 14, 1924

Be it remembered that on the 12th day of January, 1924, this cause came on to be heard upon the libel, answer, pleadings and evidence adduced, and the Court upon due consideration of the pleadings and evidence, and after hearing arguments of the Proctors for the respective parties dismissed this cause on the sole ground that this Court has and had no jurisdiction of the said cause as a Federal Court, and accordingly directed that a decree be made and entered herein dismissing the libel for want of jurisdiction in the Court as a Federal Court over the subject matter of the cause, and this ruling of the Court is hereby certified to the Supreme Court of the United States.

Dated this 14th day of February 1924.

(Signed) Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana.

[fols. 49 & 50] BOND ON APPEAL FOR $100—Approved and filed Feb. 14, 1924; omitted in printing

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[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 14, 1924

Mr. H. J. Carter, Clerk U. S District Court, City.

DEAR SIR: In making the transcript of appeal taken by the Doullut and Williams Company, Inc., to the Supreme Court of the United States, please incorporate therein the following documents, to-wit:

1. The libel with affidavit as to mailing copy of libel to attorney general, etc.;
2. The answer of respondent;
3. All testimony as taken on the part of libellant, and notes of evidence and exhibits, made part thereof, including photographs of locality and of piling;
4. Final decree;
5. Petition for appeal and order allowing appeal;
6. Assignment of Errors;
7. Certificate of Court certifying question of jurisdiction;
8. Appeal Bond.

And we, the undersigned Proctors for the respective parties agree that the above and foregoing præcipe is correct; that the papers exhibits and proceedings therein set forth are sufficient for a complete record in this cause on appeal and we, hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript, and we h[illegible]by waive the issuance and service of notice upon any party hereto, and agree that said præcipe will be obeyed by, and acted upon by, the Clerk as fully and to all intents and purposes in the same manner as if said præcipe had been regularly filed and a true copy thereof served upon each party hereto.

(Signed) McCaleb & McCaleb, Proctors for Libellant. Terriberry, Rice & Young, Proctors for Respondent.

[fol. 52] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify the foregoing 51 pages contain and form a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings together with original exhibits, in the matter entitled Doullut & Williams Company, Inc., versus United States of America, No. 17,152, of the docket of this Court, in Admiralty as made up in accordance with Præcipe, copied therein.

Witness my hand and the seal of said court at the City of New Orleans, La., this 7th day of March, A. D., 1924.

H. J. Carter, Clerk, by E. V. Vendling, Deputy Clerk. (Seal of U. S. District Court for the Eastern Dist. of La. N. O. Div.

Endorsed on cover: File No. 30,181. E. Louisiana D. C. U. S. Term No. 317. Doullut & Williams Company, Inc., appellant, vs. The United States of America. Filed March 10th, 1924. File No. 30,181.